The University of the State of New York

The State Education Department
State Review Officer
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No. 20-096

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which declined to determine their son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2019-20 school year and found that the educational program and related services the district's Committee on Special Education (CSE) had recommended for their son for the 2019-20 school year was appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The educational programming of the student in this case has been the subject of prior due process proceedings and litigation related to the 2013-14 school year (J. v. New York City Dep't of Educ., 2016 WL 9649880 [E.D.N.Y. Aug. 8, 2016], aff'd, 700 Fed. App'x 25 [2d Cir. July 7, 2017]; Application of a Student with a Disability, Appeal No. 14-026). At one time the student attended the Seton Foundation for Learning (Seton) and the parents sued the district for tuition reimbursement, but ultimately the parents were not successful (see J., 2016 WL 9649880, at *1-*2, *5-*8). It appears that the parents then proceeded to due process thereafter in connection with

the 2015-16, 2016-17, 2017-18, and 2018-19 school years, and the parties disputed whether the student required a particular methodology, Rapid Prompting Method (RPM), to be used with the student in his programming, and in a decision dated October 16, 2018, the methodology issue was decided in the parents' favor and they were granted retroactive reimbursement for "all of their documented costs of providing RPM services to the student" (SRO Ex. I at pp. 3-4).[1] As further described below, another due process proceeding was initiated with respect to the student's educational programing for the 2019-20 school year, which is the subject of the instant proceeding.

According to a July 2018 psychoeducational evaluation report, the student had received a diagnosis of an autism spectrum disorder, was primarily nonverbal, and required extensive interventions to support his learning and development (Parent Ex. B at p. 1). With respect to his educational background, for kindergarten through sixth grade the student attended Seton, an approved private special education school, in a self-contained class (id.). According to the parents, they began using the RPM methodology with the student in July 2015 (Parent Ex. F at p. 7).

During the 2017-18 school year (eighth grade) the student attended a 6:1+2 special class in the district, received counseling, speech-language therapy, occupational therapy (OT), and full-time health paraprofessional services, and was provided a dynamic display speech generating device (Parent Exs. B at pp. 1-2; C at p. 1). At home, the student received private services using the RPM methodology twice per week, which was described as "the use of a letter board, facilitated by a trained therapist" (Parent Ex. B at p. 2).

For the 2018-19 school year (ninth grade) the student attended a 6:1+1 special class in a specialized district high school and received services including the support of a 1:1 paraprofessional and speech-language therapy (Dist. Exs. 1 at p. 1; 2 at p. 1). He continued to receive instruction using the RPM methodology at home (see Tr. p. 164; Parent Ex. A at p. 8).

A CSE convened on March 29, 2019 "to add on to the IEP" the order from a prior impartial hearing that directed the use of the RPM methodology "for all instructional periods in the classroom," to be implemented beginning April 18, 2019 (Tr. pp. 209-11; Parent Ex. A. at pp. 1, 25, 28). Finding that the student was eligible for special education as a student with autism, the March 2019 CSE recommended a 12-month program in a specialized school consisting of a 6:1+1 special class placement for instruction using the RPM methodology in math, social studies, English Language Arts (ELA), and sciences, 1:1 health and transportation paraprofessional services, and use of a dynamic display speech generating device and a letter board "in all instructional periods" (Parent Ex. A at pp. 1, 19-21, 24).[2] The CSE also recommended that the student receive the following related services on a weekly basis: two 30-minute counseling sessions in a group of three, two 30-minute individual OT sessions, two 30-minute individual speech-language therapy sessions, and one 30-minute session of speech-language therapy in a group (id. at pp. 19-20). Two

[1] As described further below, pursuant to 8 NYCRR 279.10(b), the undersigned directed the district to file a copy of the October 2018 IHO decision from the prior proceeding. For purposes of this decision, the October 2018 IHO decision shall be cited as SRO Exhibit "I."

[2] The student's eligibility for special education as a student with autism is not in dispute (see Dist. Ex. 5; see also 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

60-minute sessions per year of group parent counseling and training were also recommended (id. at p. 19).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 6, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Dist. Ex. 5). Initially, the parents asserted that the student's pendency program included home-based RPM instruction as ordered by an unappealed IHO decision concerning the previous several school years (see id. at p. 5).

Turning to the merits, the parents asserted that the March 2019 CSE had "failed to implement a critical mandate" from the unappealed IHO decision, in that, although the CSE considered including home-based instruction using the RPM methodology in the student's 2019-20 IEP, it failed to recommended such services based on "contrived and unlawful grounds" (Dist. Ex. 5 at pp. 2, 3-4). Specifically, the parents challenged the CSE's finding that the recommended program without those services was the student's least restrictive environment (LRE) and its conclusion that adding the services would be "too restrictive" (id. at pp. 2, 3). The parents argued that LRE principals applied only to classroom placements and access to typically developing peers, rather than a student's need for a related service (id. at pp. 2, 3-4). Further, the parents argued that the CSE's assertion that the March 2019 IEP as written should be "given time to work" before adding home-based services was likewise not an appropriate basis to deny the student the services (id.). The parents also asserted that the IEP lacked a sufficient description of the student's needs and abilities with respect to science and social studies, and lacked adequate goals for those subjects, which indicated to the parents that the RPM methodology may not have been properly implemented in those subjects as called for in the March 2019 IEP (id. at pp. 4-5).

As relief, the parents sought funding for "at least 10 hours per week of RPM support services at home in addition to the full time 1:1 RPM support services throughout his school day that the IEP already provides" (Dist. Ex. 5 at p. 5 [internal footnote omitted]).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 20, 2019 and concluded on January 6, 2020 after two days of proceedings (Tr. pp. 1-290). In a decision dated May 24, 2020, the IHO determined that the district offered the student a FAPE for the 2019-20 school year and denied the parents' requested relief (IHO Decision at p. 19).[3] With respect to the student's pendency placement, the IHO indicated that "previous[] IHO decisions" had ordered reimbursement for home-based RPM services, and that the parents requested continued funding for RPM home-based services "pending the outcome" of this proceeding and subsequent appeals (IHO Decision at p. 13). However, the IHO also noted that the district contended that the parents were not "litigating 'pendency,'" but rather were seeking "a new service" in the form of 1:1 home-based RPM "SETSS"

[3] The IHO's decision was not paginated. For ease of reference in this decision, citations to the IHO's decision will reflect pages numbered "1" through "21" with the cover page identified as page "1."

(id.).[4] The IHO cited the Second Circuit Court of Appeal's recent opinion in Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 523 (2d Cir. 2020) for the proposition that it is a school district that decides how the "last agreed-upon educational program" is to be provided at public expense during the pendency of an IEP dispute (id.). Also with respect to the student's pendency (stay put) placement, the IHO determined that the parents did not request a pendency finding in their due process complaint notice, and only did so in their closing brief, and that any "request for pendency and related order, if any, [wa]s terminated by [the IHO's] final decision on the merits" (id. at p. 14).

In finding that the district offered the student a FAPE, the IHO determined that there were no procedural violations by the March 2019 CSE, that the evaluations of the student were sufficient to develop the student's programming, and that the parent conceded that the CSE's recommendations were comprehensive and included the RPM methodology (IHO Decision at pp. 17-18). Lastly, as for the relief sought, the IHO found that the parents had not shown how the requested 10 hours of home-based RPM services were "necessary to permit [the student] to benefit from instruction (id. at p. 18). The IHO found that the parents had no witnesses or documentation supporting their requested relief and that, while the "[p]arent[s] did submit documents in evidence, it is fundamentally unfair to allow either party to rely solely on the submission of documents in meeting its burden under law, where those documents are rife with double, triple and even unidentified hearsay sources, that cannot be cross examined" and cited case law to the effect that hearsay evidence without the opportunity for cross-examination may result in a deprivation of a fair hearing (id. at pp. 18-19). Based on the foregoing, the IHO found that the district offered the student a FAPE and that the parents failed to meet their burden to demonstrate the appropriateness of the relief sought (id. at p. 19).[5] However, the IHO ordered the district to conduct timely evaluations and reconvene a CSE meeting to develop an IEP for the student's 2020-21 school year (id. at pp. 19-20).

IV. Appeal for State-Level Review

The parents appeal and the following issues presented in their request for review must be resolved in order to render a decision in this case:

1. Whether the IHO's conduct and rulings in the impartial hearing demonstrated bias against the parents or a lack of impartiality.

2. Whether the IHO inappropriately shifted the burden of proof onto the parents by describing the requested home-based RPM services as a unilateral placement of the student that the parents bore the burden to show were required for the student.

[4] As referenced in this hearing record "SETSS" is the acronym for special education teacher support services (see Tr. pp. 22, 30, 37).

[5] The IHO also found that there were no equitable considerations that would have barred "an award on behalf of the [p]arent[s]" (IHO Decision at p. 19).

3. Whether the IHO erred in failing to determine a pendency program for the student and whether that program includes home-based RPM services as the parents assert.

4. Whether the IHO erred in failing to determine that the March 2019 IEP lacked a sufficient description of the student's needs and abilities with respect to science and social studies, and lacked adequate goals for those subjects.

5. Whether the IHO erred in failing to determine that the student required 10 hours per week of extended school day / home-based RPM services in order to receive a FAPE.[6]

6. Whether the IHO erred in failing to determine that the district failed to meet its burden to show that the RPM methodology was properly implemented as called for in the March 2019 IEP.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck

[6] The parents do not use the term "extended day," but by seeking home-based services after the student's day in the school environment has concluded, the parents in effect are seeking a specific subset of "extended day" services, one in which the location of the services is specified as the student's home.

Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. IHO Bias and Impartiality

Turning first to the parents' allegations that the IHO's rulings and the manner in which he conducted the impartial hearing reflected his bias against the parents, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). While not defined by regulation, citations to the hearing record and to applicable law and application of that law to the facts of the case are generally considered to be the norm in "appropriate standard legal practice" and should be included in any IHO decision. In addition, State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

In the instant matter, the parents assert two main arguments to support their claim that the IHO acted with bias. First, the parents contend that, over their objection, the IHO erred and

allowed the district to make a case that the RPM methodology in the March 2019 IEP was only written into the IEP because a previous IHO decision ordered the district to do so. During the impartial hearing the district, somewhat incongruously, went on to argue—and present witness opinion testimony—that while the RPM methodology was ineffective and not necessary the IEP nonetheless offered the student a FAPE. In the parents' view, the IHO should have ordered the district to either defend the March 2019 IEP as offering the student a FAPE or concede that it had failed to offer a FAPE on the basis that the RPM methodology, being ineffective in the district's view, rendered the IEP inappropriate.

While I agree that it was a perplexing twist of events when the district argued that the March 2019 IEP offered the student a FAPE even though the district's own witnesses testified that the student did not need the educational methodology mandated on the IEP in every instructional class (see, e.g., Tr. pp. 58-59, 107-08, 153-54, 176-77, 189),[8] I disagree with the parents' view that it was the IHO's responsibility to order the district to structure its argument in a particular way or that the absence of such an order constituted evidence of bias or a lack of impartiality on the part

[8] I seems that the likely explanation for the district's peculiar behavior in this case is that there was some kind of disconnect between its representatives in the hearing processes and its methodological experts and that, only after it failed to further appeal the October 2018 IHO decision and this case was initiated, it came to light that some staff in the district may not have agreed with the outcome of the October 2018 decision. The evidence in this case shows some of that disagreement with the RPM methodology. For example, the special education teacher testified that the student's progress observed was not the result of the use of the RPM methodology and that the student could demonstrate measurable progress without it (Tr. p. 176). Specifically, the special education teacher stated that there were various ways to measure a student's growth, and by using the student's preferred method of communication rather than "the board," the student had shown growth (id.). For example, the student verbalized, pointed to communication symbols, and used graphic organizers (Tr. pp. 176-77). Additionally, the special education teacher opined that the use RPM did not lead to "an accurate representation of the student's communication" because he "found that it was difficult to replicate answers with different facilitators" from the student's home-based RPM provider (Tr. pp. 163-65). He further testified that "we wouldn't be able to get the same type of response to the same questions if there was a different person holding the board for [the student]" (Tr. p. 165). The RPM methodology is not without controversy in educational circles and has been the subject of dispute elsewhere—as noted in one State-level due process decision "[t]he American Speech Language Hearing Association has issued a position statement which is currently in effect on Rapid Prompting Method, which includes the Spelling to Communicate method. The American Speech Language Hearing Association does not recommend the use of such methods. The American Speech Language Hearing Association requires speech language pathologists to inform and warn clients, family members, caregivers, teachers, administrators and other professionals that there is no evidence that messages produced using these methods reflect communication by the person with a disability before using or considering using rapid prompt methods, such as Spelling to Communicate," and the parents in that proceeding conceded that there was no scientific research to support the Spelling to Communicate method (In re Lower Merion School District, 120 LRP 14590 [SEA PA Dec. 15, 2019]; see K.M. by & Through C.M. v. Bd. of Educ. of Montgomery Cty., 2019 WL 330194, at *2 [D. Md. Jan. 25, 2019] [noting that the school district refused to employ the facilitated communication method used by a parentally-obtained private provider], adhered to on denial of reconsideration, 2019 WL 3892321 [D. Md. Aug. 19, 2019]); however, at times, other school districts appear to have allowed at least some use of this methodology with some alleged problems (see Duncan v. San Dieguito Union High Sch. Dist., 2019 WL 4016450, at *1 [S.D. Cal. Aug. 26, 2019]). This discussion is only to provide some context for the issue in this appeal in which the parents attack the IHO's handling of the district's case and to note that, while not everyone agrees about the use of the RPM, the efficacy of the methodology is not in dispute in this particular case because the district did not appeal from the October 2018 IHO decision and employed the RPM methodology on the student's IEP.

of the IHO.[9] It is up to each party to mount a legal argument and present facts in support of their viewpoint during the impartial hearing in a manner as each party sees fit.

The second argument on bias presented by the parents is that the IHO made some statements during the impartial hearing, as well as a series of pre-hearing rulings concerning the conduct of the hearing, that both showed his general bias against parents in impartial hearing proceedings and also directly impeded the parents' ability to fairly present their case. With respect to the statements, the parents contend that the IHO's statement at the outset of the hearing that he conducts matters "more formally" because the impartial hearing process is "out of control" implies that the IHO may believe that it has become too easy for parents to file a due process complaint notice and get a decision in their favor (see Tr. p. 5). Taken in the context of the discussion the IHO and the student's father were having at the outset of the impartial hearing, it does not appear that the IHO's statement demonstrated any bias or lack of impartiality. Rather, the IHO was informing the student's father that the IHO typically conducted the impartial hearings he presided over in a more formal and legalistic manner then some other IHOs because he believed "it is a process in [the district] which has gotten out of control, and the only way [he] c[ould] get some control and handle on things [wa]s to be a little more stringent about the rules" (Tr. p. 5).[10] The IHO then gave the parents an opportunity to obtain counsel and mentioned that there was information available regarding attorneys who may provide legal services on a pro bono basis and the opportunity for recovering attorney fees should a parent prevail in an impartial hearing (Tr. pp. 5-6). The IHO then asked the student's father how he wanted to proceed, and the student's father responded, "I would like to proceed pro se," after which the parties began to discuss the student's pendency placement (Tr. p. 6).

The parents also contend that the IHO's stringent rules for hearing conduct places the parents in an unfair disadvantage. For example, the parents assert that the IHO's prohibition on telephonic testimony (on the theory that the expense of presenting live witnesses encourages settlement) overburdens parents who may have to pay more to present professionals and experts, while the district witnesses are either employees on salary or experts paid at public expense.[11]

[9] The IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), which is often necessary with respect to facts relevant to the disputed issues in a case to ensure that the IHO has an adequate record to support his or her decision. State regulation also provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). But nothing requires the IHO to order a party to pursue or avoid a particular strategy.

[10] The IHO was likely referring to a now well-documented problem in the district in which it has been noted that "New York exceeds by 63 percent the next most active state (California) with due process complaint filings. Additionally, within New York State, the overwhelming majority of due process complaints are filed in New York City. In the 2018-2019 school year, 10,189 special education due process complaints were filed in New York State; of these, 9,694 filings, or 95 percent, were in New York City. That amount is expected to increase during the 2019-2020 school year. This unprecedented volume of special education due process complaints is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15).

[11] The IHO's "letter to the litigants" wherein he sets forth standing rules for the conduct of the impartial hearing is not a part of the hearing record. The IHO is required to include "orders, rulings or decisions," which would

However, the wording of the purported "rule," as quoted in the parents' request for review (Req. for Rev. ¶ 35 n.4), applies to both parties equally, and the rationale, which includes a comment that "frivolous claims are being taken and/or defended," also appears to refer to any party to an impartial hearing, be it a district asserting a frivolous defense or a parent overreaching while asserting the rights of a student with a disability.

That said, blanket, inflexible rules on the conduct of an impartial hearing, adhered to without the use of appropriate discretion, can in some circumstances create unjust results for the parties access to the due process afforded by the impartial hearing process (see, e.g., Application of a Student with a Disability, Appeal No. 20-009 [finding that an IHO failed to provide both parties with a sufficient opportunity to present evidence in accordance with their right to due process, and erred in dismissing a parent's due process complaint notice]). However, that does not appear to have occurred in the present matter, in that the parents do not assert that they were prevented from presenting any specific witness at the impartial hearing by the rule for in-person testimony employed by the IHO, nor do they assert that they sought any relaxation of the IHO's ruling in this instance. In light of the above, I decline to find that the IHO exhibited any bias or lack of impartiality in this particular matter under review.

2. Burden of Proof and the IHO's Consideration of Evidence

The parents assert that the IHO erred in referring to the parents' requested relief—funding for home-based RPM services—as a "unilateral placement." The parents contend that, for all relevant time periods, the student was attending a district-assigned public school and that the parents were seeking the home-based services as "additional support" (Req. for Rev. ¶ 20). The parents assert that by treating the case as a tuition reimbursement case, the IHO shifted the burden of proof to the parents in contravention of State law.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, even if the parent initiates due process, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch.

include prehearing orders sent to the parties, as part of the hearing record (8 NYCRR 200.5[j][5][vi][c]). However, the parents quote portions of the letter in their request for review, to the effect that "Rule No. 8" is a prohibition of telephonic testimony (Req. for Rev. ¶ 35 n.4). According to the parents, the letter further states that "[t]he time and expenses of presenting live witnesses also encourages the parties to settle cases, many of which indefensible and frivolous claims are being taken and/or defended" (id.). It is also noteworthy that the in-person phase of the impartial hearing in this matter concluded approximately two months prior to the reported onset of the COVID-19 pandemic in March 2020 (see Tr. p. 124). After the onset of the pandemic, State regulations were amended on an emergency basis to explicitly authorize videoconferencing from a social distancing perspective (see N.Y. Reg., April 22, 2020, at p. 7), and, as part of a longer, separate rulemaking process that ran its course both before and after the onset of the pandemic, other amendments became effective in July 2020 that explicitly authorized video and teleconferencing during impartial hearings in general in response to the overwhelmed due process system (N.Y. Reg., July 29, 2020, at pp. 14-17).

Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In their due process complaint notice, the parents' requested resolution included that the student's "IEP should provide funding for at least 10 hours per week of RPM support services at home in addition to the full time 1:1 RPM support services throughout his school day that the IEP already provides" (Dist. Ex. 5 at p. 5 [internal footnote omitted]). In that same requested resolution, the parents also stated that "[w]e are now requesting that the [district] fund this service for [the student] directly going forward, and that we be reimbursed for our out-of-pocket RPM expenses from July 1, 2019 until the DOE begins funding this service directly as a result of a decision favorable to us in this matter" (id.).

Thus, the parents' view of events is factually accurate insofar as the student was not removed from the public school and the services called for in the student's IEP were to be delivered by the district, including the instruction using the RPM methodology that they obtained through their previous due process proceeding. To that extent, these circumstances are unlike those in which a parent has removed a student from the public school and unilaterally chosen a replacement for the public services in the form of private specialized schooling—a common fact pattern in a tuition reimbursement case—however, to the extent the parents in this case were also requesting retroactive reimbursement for the costs associated with a unilaterally selected and obtained portion of the student's placement that was not offered as part of the public programming—in other words the home-based RPM services that the March 2019 CSE refused to include as part of the student's IEP—I find that the burden to prove the appropriateness of any home-based services actually delivered rested on the parents.[12] Accordingly, I decline to reverse the IHO's decision that the parents carried some burden of proof in this matter.

With that said, the district was first required to meet its burden of production and persuasion with respect to the appropriateness of the March 2019 IEP and the CSE's decision not to recommended extended school day / home-based services. The IHO did not explicitly discuss the evidence from this perspective, instead jumping to examine the appropriateness of home-based services as requested relief (see IHO Decision at p. 18). In any event, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, I reach the same determination as the IHO with regard to the parents' FAPE challenges in the 2019-20 school year, albeit upon a different view of the evidence in the impartial hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

Related to the parents' allegations regarding the IHO's allocation of the burden of proof, the parents also contend that the IHO failed to meaningfully consider the recommendations for home-based RPM services contained in the private psychoeducational evaluation of the student conducted during June and July 2018 (see Parent Ex. B). I agree that the reasons that the IHO gave for disregarding the private psychoeducational evaluation report—as well as other documentation entered into the hearing record by the parents—was erroneous. In his decision, the

[12] Ultimately, it is unclear from the hearing record if the parents ever obtained home-based RPM services for the student during the 2019-20 school year at their own expense.

IHO set forth these comments with respect to the parents' claim that the student required home-based RPM services:

> Here, the [p]arent[s] needed only to demonstrate that the relief sought provides educational instruction specially designed to meet the unique needs of the student . . . . However, here the [p]arent[s] did not call any witnesses to testify on [their] behalf and did not submit any testamentary or documentary [evidence] that supports a finding that the relief sought is appropriate.
>
> While the [p]arent[s] did submit documents in evidence, it is fundamentally unfair to allow either party to rely solely on the submission of documents in meeting its burden under law, where those documents are rife with double, triple and even unidentified hearsay sources, that cannot be cross examined.

(IHO Decision at p. 18).

However, SRO's have routinely held that the formal rules of evidence applicable in civil actions generally do not apply in impartial hearings (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013] [citing Richardson v. Perales, 402 U.S. 389, 400 (1971) for the proposition that the strict rules of evidence do not apply in an administrative proceeding and noting that application of the Daubert gatekeeper requirement is highly questionable in IDEA proceedings]; Council Rock Sch. Dist. v. M.W., 2012 WL 3055686, at *6 [E.D. Pa. July 26, 2012]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977]; Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]). This is in part because the "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility that they need to ensure that each side can fairly present its evidence" (Schaffer, 546 U.S. at 61).

State regulations governing the conduct of impartial hearings do not authorize IHOs to impose a rigid, unyielding approach to the admission of evidence at the initial due process hearing. Instead, the regulations provide that each party "shall have up to one day to present its case" and that the IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (NYCRR 200.5[j][3][vii], [xiii]). State regulations do not sanction the exclusion of evidence solely because would violate the technical requirements of the hearsay rule under federal or state law, and instead provide that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).[13] Thus an IHO is responsible to manage the hearing process and must

[13] One of the purposes of the hearsay rule in a court proceeding is to exclude evidence that that is inherently unreliable, but at times the arguments that the statements must be excluded are overbroad (see H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 621 [E.D. Pa. 2012] [noting that the hearing officer correctly admitted the testimony because it was being offered to show the basis for an opinion or a decision—usually the revision of an IEP—not for the truth of the matter asserted]). Furthermore, even if the statements are hearsay, it is well settled that reliability for hearsay statements can be sufficiently established for admissibility purposes through other

allow each party a reasonable opportunity to present relevant, nonduplicative evidence and must ensure that there is an adequate record to support his or her decision on the disputed issues, but the IHO must also be prepared to stop parties from wasting time and polluting the hearing record with matters that are simply cumulative with respect to the evidence already received or irrelevant to the disputed issues that are properly within the scope of the impartial hearing. A blanket exclusion of documents under the hearsay rule is not an example of effectively managing the hearing.

Courts across the country routinely reject the notion that the hearsay rule automatically applies or excludes evidence an administrative due process proceeding under IDEA (see I.W. by & Through A.M.V. v. Lake Forest High Sch. Dist. No. 115, 2019 WL 479999, at *10 [N.D. Ill. Feb. 7, 2019]; J.B. by & through Belt v. D.C., 325 F. Supp. 3d 1, 13 [D.D.C. 2018]; E.P. By & Through J.P. v. Howard Cty. Pub. Sch. Sys., 2017 WL 3608180, at *18 [D. Md. Aug. 21, 2017], aff'd sub nom., 727 Fed. App'x 55 [4th Cir. June 19, 2018]; N.G. v. N. Valley Reg'l High Sch. Bd. of Educ., 2017 WL 5515913, at *8 [D.N.J. Mar. 31, 2017] [finding that dealing with hearsay evidence was a matter of discretion, but that the ALJ's rejection of the parents' hearsay evidence "fundamentally skewed" the decision]; A.A. v. Goleta Union Sch. Dist., 2017 WL 700082, at *3 n.7 [C.D. Cal. Feb. 22, 2017]; Wilson v. Colbert Cty. Bd. of Educ., 2008 WL 11424188, at *19 [N.D. Ala. Apr. 17, 2008]; Jalloh v. D.C., 535 F. Supp. 2d 13, 22 [D.D.C. 2008]; Sykes v. D.C., 518 F. Supp. 2d 261, 268 [D.D.C. 2007]). Although the parents' documentary evidence may not carry the day in terms of the outcome of the administrative proceedings, as further described below, the evidence was relevant and not unduly repetitious and, accordingly, it was error for the IHO to exclude it from his consideration entirely on the basis of the hearsay rule only. Rather than further protract these proceedings by remanding the matter to the IHO for additional findings, in this instance I will consider the evidence now as a matter within my discretion and render a determination.

3. Pendency

The parents assert that the IHO erred in failing to issue a pendency order defining the student's placement during the pendency of the impartial hearing. The parents assert that the student's pendency lies in an unappealed IHO decision dated October 16, 2018, and includes 10 hours of home-based RPM services. The parents also argue that the IHO erroneously agreed with the district's assertion that the parents were seeking a new service in the form of 10 hours of RPM services in the home, and also erred in holding that "any request for pendency and related order if any, is terminated by this final decision on the merits" (see IHO Decision at p. 14). In response the district contends that the IHO correctly determined that home-based RPM instruction was a

safeguards and thus there are a litany of exceptions to the hearsay rule. Moreover, hearsay exclusions are usually carefully tailored (see J.W. v. Gardner Sch. Dist. No. 231, 2011 WL 1234389, at *4 [D. Kan. Mar. 31, 2011] [admitting an exhibit that consisted of an evaluation report but excluding the last page, which was a separate email produced after the fact because the parent did not seek to introduce it until after the evaluator had finished testifying; the court declined to find that the hearing officer improperly excluded the evidence because the author of the email was present at the hearing and could have testified about the email]). In this case, rather than giving the proffered evidence the weight it was due, the IHO simply refused sua sponte to consider it and mechanistically applied blanket exclusion under the hearsay rule without even considering or explaining why none of the many exceptions were applicable to some or all of the evidence (i.e. present sense impression, then-existing mental, emotional, or physical condition, statement made for medical diagnosis or treatment, records of a regularly conducted activity [business record exception], etc.).

request for a new service above and beyond pendency and also asserts—for the first time in its answer on appeal—that the student's pendency placement lies in and is defined by an IEP developed for the student at a December 1, 2018 CSE meeting.[14]

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906;

[14] The district submitted a copy of the December 1, 2018 IEP as an exhibit to its answer (see Answer Ex. 1). In their reply, the parents argue that the IEP "is irrelevant and should be disregarded by the SRO" (Reply ¶ 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). SROs have also considered the factor of whether the additional evidence was available or could have been offered at the time of the impartial hearing (Application of a Student with a Disability, Appeal No. 08-030). This requirement serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). That factor is of less weight in this instance, where both parties were aware of the existence of the IEP and the document is not relevant to the ultimate merits of the parents' claims. Furthermore, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). In this instance, the IEP is necessary to resolve the question of the student's pendency placement, and, therefore, I will consider the district's additional evidence.

O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2012]). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

Initially, the IHO's failure to issue an interim decision defining the student's then-current educational placement for the purposes of pendency was error because the student's entitlement to a "stay put" placement arises when a due process complaint notice is filed, pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief. More seriously, the IHO's holding that the parents had not requested a pendency order in their due process complaint notice—rather had only done so after the impartial hearing had

convened and in their closing brief—is not only immaterial to the issue,[15] it was also an error of fact, as the parents requested home-based RPM services during the pendency of the proceeding until a final order was issued by the IHO and asserted that the previous unappealed October 16, 2018 IHO decision formed the basis of the stay-put program (see Dist. Ex. 5 at p. 5). Further, the IHO's holding that "any request for pendency and related order if any, is terminated by this final decision on the merits" was also error because the pendency provision requires a school district to continue funding the stay put placement for the duration of any proceedings relating to the identification, evaluation or placement of the student. That would include the course of the impartial hearing below, the instant appeal for State-level review, and any subsequent action seeking judicial review. A decision on pendency could also affect the parties' legal obligations since the district could, depending on the outcome of a pendency determination, owe the student more services under pendency even if a decision on the merits reached a different outcome than the pendency decision. Accordingly it was error for the IHO to refuse to issue a determination with respect to the student's stay put placement.

Turning to the substance of the parties' arguments with respect to the student's pendency (stay put) placement, the parents asserted during the impartial hearing that the student's pendency placement was controlled by the terms of an unappealed IHO decision dated October 16, 2018 and they tried to enter a copy of the decision into the hearing record (see Tr. pp. 7, 11, 17, 25-28, 41, 129, 195-96). The district had no objections to the parents' offered documentary evidence (Tr. p. 25). The IHO should have admitted the document itself into the record. Although the IHO never entered the decision into the hearing record, he eventually took "judicial notice" of it and read a portion into the hearing record (Tr. pp. 195-96). During this State-level review the undersigned, by letter dated June 24, 2020, directed the district to provide a copy of the October 2018 decision, and the district complied. The unappealed October 2018 IHO decision requires the "utilization of RPM through a trained provider onto the student's IEP for all his instructional periods" and reimbursement to the family for "all of their documented costs of providing RPM services to the student during the 2015-16, 2016-17, 2017-18, and 2018-19 school years" (SRO Ex. I at pp. 3-5).[16] The parents contended at the impartial hearing and continue to assert in the instant proceeding

[15] Because pendency operates as an automatic injunction that arises as a result of the filing of a due process complaint notice, it is not necessary for a party to assert or "invoke" the right to pendency in the due process complaint notice under the pendency provision (20 U.S.C. § 1415[j]). In other words, pendency dispute cannot occur until after a due process complaint has been filed and, consequently, the student's right to the stay put placement is not waived because a party fails to address it the due process complaint notice. Instead it is the district's responsibility upon filing to implement the "then current educational placement" in accordance with 20 U.S.C. § 1415(j), and the parties should thereafter notify the IHO if there is a dispute over which services constitute that educational placement so that the IHO can ensure that arrangements are made for the submission of any necessary evidence on the issue and the matter is decided. On the other hand, if there is no dispute, no order is required, and the district is obligated to implement the stay put placement without the need for input from the IHO (see Letter to Goldstein, 60 IDELR 200 [OSEP 2012] [indicating that a district may not wait for a formal order from a hearing officer before implementing a student's stay-put placement where the stay put placement is uncontested]; Application of a Student with a Disability, Appeal No. 18-058).

[16] The October 2018 IHO decision refers to March and November 2017 IEPs as "the most recent IEPs" entered into evidence in that proceeding; however, by the terms of the IHO's order, the student's IEP was to be modified going forward (SRO Ex. I at pp. 3-5). Neither party asserts that the November 2017 IEP is relevant for purposes of pendency.

that the reimbursed RPM services were the 10 hours per week of home-based RPM instruction (Tr. pp. 6-7; Dist. Ex. 5 at p. 5).

Although silent before the IHO, for the first time in this State-level review, the district now contends that the CSE met on December 1, 2018 to develop a program for the student after the October 2018 IHO Decision was rendered (Answer Ex. 1 at p. 26). The district asserts that "neither side disputes" that the student's December 1, 2018 IEP was implemented and contends that, because the parents did not institute a due process proceeding concerning the December 1, 2018 IEP, that IEP constitutes the last agreed-upon IEP and should set the student's pendency rather than the unappealed October 16, 2018 IHO decision (Answer ¶ 15).[17] The services established by the December 2018 IEP include a 12-month program, 6:1+1 special classes, and related services, but without RPM-based instruction in the classroom or home-based / extended school day services (Answer Ex. A at pp. 18-21). Thus, in the district's view, the proper pendency services were provided.

I find that neither party is entirely accurate with respect to the student's pendency placement. The district's argument that the December 2018 IEP is relevant to the placement has some merit, albeit the "last agreed-upon IEP" language used by the district is an imprecise term in that it is not entirely controlling in these circumstances. The problem with relying solely on the December 2018 IEP is that the district ignored the terms of the unappealed October 2018 IHO decision which dictated the use of the RPM methodology during each of the student's instructional periods going forward during the 2018-19 school year, and failing to give any effect to the unappealed directives upon which the parents prevailed in that final determination would render that entire proceeding pointless. However, the October 2018 IHO decision only went so far as to find that the district was required to use the RPM methodology with the student, not that the student required services beyond the school day or in the student's home in particular (SRO Ex. I at p. 4). The IHO explicitly required the district to 1) modify the student's IEP to add the RPM "for all of his instructional periods" and 2) for the CSE to then "consider the recommendations of these reports for services in school and out" (SRO Ex. I at p. 4 [emphasis added]). Thus, the unappealed October 2018 IHO decision required the use of the RPM methodology with the student going forward, but it did not mandate extended school day or home-based instruction for the student; it merely required the CSE to consider it as an option. The December 2018 CSE considered the need for home-based services and explicitly rejected this option as overly restrictive (Answer Exs. 1 at p. 26; 2 at p. 2). Accordingly, I find that the student's pendency placement includes the services set forth in the December 2018 IEP, but with the addition of the RPM methodology in each of the student's instructional periods as required by the October 2018 unappealed IHO decision (see Dervishi, 653 Fed. App'x at 57-58 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; Student X, 2008 WL 4890440, at *23 [holding that a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency]; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

[17] The December 1, 2018 IEP states on its cover page that the IEP was to be implemented beginning on December 11, 2018; however, the attached prior written notice states that the IEP services would be provided beginning on February 28, 2019 (compare Answer Ex. A at p. 1, with Answer Ex. B at p. 3).

B. March 2019 IEP

1. Present Levels of Performance and Annual Goals

On appeal the parents assert that the IHO erred by failing to find that the March 2019 IEP was "substantially deficient on its face" because the present levels of performance did not contain academic achievement information and annual goals that were related to social studies and science (Req. for Rev. at ¶ 2).[18] However, review of the March 2019 IEP shows that the present levels of performance and annual goals the CSE developed reflected and addressed the student's special education needs consistent with the evaluative information available at the time of the meeting (compare Parent Ex. A at pp. 1-12, with Parent Exs. B-C, and Dist. Exs. 1-2) and for the reasons discussed below, the lack of achievement information and annual goals in the IEP specific to social studies and science content areas does not result in a denial of a FAPE.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, contrary to the parents' assertion, neither the IDEA nor State law requires a CSE to specifically formulate the description of a student's academic achievement and functional performance using a class-by-class description (see Present Levels of Academic Achievement and Functional Performance, 71 Fed. Reg. 46,662 [Aug. 14, 2006] [noting that "the definition could vary depending on a child's circumstance or situation, and therefore, we do not believe a definition of 'academic achievement' should be included in these regulations"]; see also Anello v. Indian River Sch. Dist., 355 Fed. App'x 594, 599 [3d Cir. Dec. 14, 2009] [finding that the IEP merely stated that the student's present performance level is "1.8 grade level" constituted a procedural violation, but it was not a denial of a FAPE]; O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 703-04 [10th Cir. 1998] [finding that a description of the student's general intelligence range, references to raw scores on educational achievement evaluation reports that were not self-explanatory and instead referred to the evaluation reports, and motor skill assessments in the present levels of performance were not procedurally deficient or a denial of a FAPE]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]

[18] Initially, in their due process complaint notice and during the impartial hearing, the parents allegations about the present levels of performance and annual goals related to science and social studies were framed as supporting the parents' allegation that the district was not fully implementing the RPM methodology called for on the student's IEP (see Dist. Ex. 5 at pp. 4-5; see also Tr. pp. 46-47). However, towards the end of the impartial hearing and on appeal, the parents' argument has shifted and it now appears that they argue that the lack of present levels of performance and annual goals in these subject areas caused the IEP to be deficient on its face and, separately, that the district failed to meet its burden to show that it implemented the RPM methodology (see Tr. pp. 237-39; Parent Ex. F at pp. 15-20; Req. for Rev. ¶¶ 2-3). The parents' challenge relating to the present levels of performance and annual goals is discussed in the context of evaluating the appropriateness of the IEP; the allegations pertaining to implementation of the IEP are addressed separately below.

[upholding an IEP that described the student's performance in skill areas such as phonetics, decoding, reading, writing, capitalization, punctuation, grammar, spelling, vocabulary, and mathematics rather than in specific classes]; "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at pp. 18-22 [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [providing a description of the content of the present levels of performance in a quality IEP but not recommending an itemization of the student's performance in every class or content area within the general education curriculum]).

The hearing record shows that the CSE developed the student's March 2019 IEP present levels of performance and management needs from information provided and discussion by the participants at the CSE meeting (see Tr. pp. 147-48, 153-62, 169-70, 215, 244-45; Parent Exs. A at pp. 1-12, 28; B-C; Dist. Exs. 1-2). The March 2019 IEP present levels of performance reflected information from the November 2017 psychological update report, the July 2018 psychoeducational evaluation report, results of a February 2019 assistive technology evaluation, and the teacher progress and speech-language therapy progress reports dated March 26, 2019 (compare Parent Ex. A at pp. 1-12, with Parent Exs. B-C, and Dist. Exs. 1-2).[19] Academically, the March 2019 IEP included standardized assessment results that indicated the student's reading skills were approximately at a kindergarten to first grade level without the RPM/letter board assistance—although he achieved a passage comprehension near-seventh grade equivalent using a letter board—and based on teacher observation and alternate assessment performance, he was "currently performing on a 2nd grade reading level" (Parent Ex. A at pp. 1-2, 4). Teacher reports reflected in the IEP indicated that the student enjoyed being read to in a one to one setting, answered basic comprehension questions after having text read to him using his preferred method of communication (PMC) and moderate prompting, and was noted to have difficulty reading independently and answering more open-ended or extended-response type questions (id. at pp. 5, 8; see Tr. p. 70).[20] According to the IEP the student followed words being read aloud during shared reading, turned pages of the book with minimal prompting, and followed along with his finger when read to, all using his PMC (Parent Ex. A at p. 8).

Next, regarding the student's written language skills, the IEP indicated that the student independently wrote his first name but needed a verbal reminder to remain on task to complete his whole name, copied letters with prompting, and wrote simple words by copying a model, but inconsistently copied sentences (Parent Ex. A at pp. 3, 5, 8). According to the IEP, the student was also able to write three, four-word sentences from a model with minimal verbal prompting (id. at p. 8). Classroom observations indicated that the student had "shown the ability to spell out new vocabulary words on the letter board, with moderate prompting, however he ha[d] not yet shown the ability to use the new vocabulary words in his own sentences or in spontaneous conversation thru PMC" (id. at p. 5). Additionally, the IEP reflected that the student was working

[19] The February 2019 assistive technology evaluation report was not included in the hearing record (see Parent Exs. A-C; E-F; Dist. Exs. 1-5).

[20] The district speech-language pathology supervisor explained that a student's preferred method of communication was the "method that the student would [] select during the instructional time or therapy time," and that it entailed offering the student a choice of modalities, from which the student would select the method that he or she would use more often (see Tr. pp. 52-53, 70-71).

on increasing the amount of words he could copy from a model (id.). A "qualitative assessment" of the student's spelling skills yielded a "very competent" designation when using the RPM methodology (id. at p. 2). In math, the IEP reflected standardized test results which indicated that the student's calculation and math fluency skills were at a kindergarten level, although when using a letter board he achieved a fourth grade equivalent in calculation skills (id. at pp. 1-2). Teacher reports included in the IEP indicated that the student demonstrated understanding of the concept of "more," counted objects up to 10 with minimal prompting, wrote numbers 1-20 in correct number sequence, and identified five common school/math objects (id. at pp. 5, 8). Also, the IEP indicated that the student was improving his ability to identify coins but struggled to identify the correct combination to make a purchase and therefore did not complete that task independently (id.). He was also working towards completing higher level, multi-step questions (id. at p. 5).

With respect to the student's speech-language skills, the March 2019 IEP present levels of performance reflected that the student was nonverbal and demonstrated strengths in labeling items, socializing, using eye contact, and participating in therapy and classroom activities (Parent Ex. A at p. 6). The student's communication deficits included that he exhibited difficulty independently answering questions, following multi-step directions, initiating interactions with peers, and answering questions based on material read orally (id.). According to the IEP, the student primarily used a letter board to communicate thoughts, although he also used 1-2 word utterances, gestures/facial expressions, and a dynamic display speech generating device (id. at pp. 6-7).

To the extent that the March 2019 IEP present levels of social/emotional and motor performance may have reflected information about the student's needs that affected his achievement in science and social studies content areas, the IEP indicated that the student required breaks and walks around the classroom to maintain attention and self-regulation, although he had demonstrated the ability to remain seated for at least 10 minutes when provided with prompts and interesting activities, and persisted through table top tasks for extended periods of time (Parent Ex. A at pp. 7, 10-11). According to the IEP the student enjoyed engaging with peers in shared classroom and vocational tasks with support, participated in group projects, shared materials, waited his turn, and generated solutions to simple social problems (id. at pp. 7, 9). Additionally, the student needed reminders to maintain social proximity, did not often initiate interactions with peers unprompted, and at times engaged in self-directed behavior (id.). Motorically, the student required verbal cues to maintain a dynamic grasp on a writing tool, and although he effectively manipulated scissors to cut at straight line he needed some assistance to cut increasingly complex shapes (id. at p. 10).

Turning to the March 2019 IEP annual goals, the student's special education teacher and speech-language pathologist prepared teacher progress and speech-language progress reports dated March 26, 2019, which included annual goals and short-term objectives that formed the basis of the annual goals included in the IEP (Tr. pp. 147, 203; compare Parent Ex. A at pp. 14-16, with Dist. Ex. 1 at pp. 2-3 and Dist. Ex. 2 at pp. 2-3). The school psychologist testified that the CSE discussed and developed "every goal" during the course of the meeting, and the special education teacher testified that the parents "had a voice in the development of" and did not express disagreement with any of the IEP goals during the meeting (Tr. pp. 144, 203, 207, 215-16, 238-41; see Parent Ex. A at p. 28).

The IDEA requires that an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The March 2019 IEP contained 10 annual goals and corresponding short-term objectives addressing the student's identified special education needs in the areas of reading, writing, math, communication, social, and task-completion skills, as well as physical stamina (Parent Ex. A at pp. 14-18).[21] The parents do not object to any aspect of the annual goals that were included in the March 2019 IEP but rather take exception with the purported lack of goals in the IEP that were specific to social studies and science. Regarding this claim the school psychologist testified that the CSE was not required to develop goals that were "subject specific," rather, the IEP included annual "goals that sp[oke] generally to skills that would help [the student] access the curriculum" (Tr. pp. 241-42, 262). She further testified that, for example, the student's reading comprehension annual goal and use of graphic organizers and visual aids could "absolutely be applied to social studies" because students "read text and cite - - they use graphic organizers and visual aides to help them answer questions about the material they've read" (Tr. p. 242; see Parent Ex. A at p. 14). The annual goal to improve the student's ability to generate questions was "a skill that you would use in science, coming up with a hypotheses, generating questions is a skill you would use in social studies . . . [y]ou would use in all subject areas" (Tr. pp. 242-43; see Parent Ex. A at pp. 14-15). According to the school psychologist, the student's math annual goal involving graphs, symbols, and diagrams were "things that carry over into science" and that the student's goals to engage in social communication and verbalization of ideas "carrie[d] over into all subject areas" (Tr. p. 243; see Parent Ex. A at pp. 15-16).

Specific to the issue on appeal—the lack of academic achievement information about the student's social studies and science skills and corresponding annual goals for those subjects—the March 2019 IEP indicated that the student displayed enthusiasm, especially when he was interested in the topic such as science and US history (Parent Ex. A at p. 5). Although this is the extent to which the IEP specifically describes the student in relation to those two content areas, as discussed above, the CSE was not required to formulate the description of a student's academic achievement and functional performance using a class-by-class description. Further, the parents do not otherwise object to the accuracy and adequacy of the present level of performance information that was included in the IEP and as such, the lack of detailed achievement information about social

[21] The student's March 2019 IEP indicated that he would "participate in an alternate assessment on a particular State or district-wide assessment of student achievement" (Parent Ex. A at p. 23; see 8 NYCRR 200.4[d][2][iv]). Consistent with the regulations, review of the IEP annual goals shows that they include the criteria to determine if the goal has been achieved (e.g. 3 times per day for 3/5 days, 80 percent accuracy), the methods by which progress will be measured (e.g. teacher/provider observations, class activities), and the schedule by which progress would be measured (e.g. 1 time per month, 2 times per month) (Parent Ex. A at pp. 14-18; see 8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

studies and science in this instance does not rise to the level of a denial of a FAPE. Also, although the IEP did not include annual goals specific to social studies and science, where, as here, there is no dispute whether the goals are overall appropriate to offer the student a FAPE, an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE. (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Accordingly, I find that the March 2019 CSE developed the student's annual goals based on his needs, and the hearing record supports a finding that the annual goals were appropriate and measurable. To the extent that additional goals could have been drafted for the student, any lack thereof did not rise to the level of denying the student a FAPE.

2. Extended School Day / Home-Based Services

I turn next to the parents' assertion that the IHO erred in finding that the student did not require home-based RPM services to receive a FAPE. Among the documents considered, the March 2019 CSE had before it a November 2017 district psychological update report (see Parent Ex. C) and a July 2018 private psychoeducational evaluation report, which included a recommendation for, among other things, 10-hours of home-based RPM services to facilitate generalization (see Parent Ex. B).[22]

According to the resultant report, in November 2017 the district conducted a psychological reevaluation of the student "collaboratively" with his classroom paraprofessional, an RPM specialist, and a school psychologist, and "a letter board" was used throughout the assessment to facilitate the student's communication skills (Parent Ex. C at p. 1). Administration of cognitive testing yielded a full scale IQ of 45 (extremely low range); however, according to the evaluators when testing the limits of a vocabulary subtest, the student "demonstrate[d] a much higher potential in his cognitive functioning" as "through the use of a [l]etter [b]oard [the student] was able to define words at a [s]uperior/[v]ery [s]uperior level," which "indicate[d] that if not for his severe verbal communication skills [the student] ha[d] tremendous potential for higher level cognitive thinking" (id. at p. 2). Results of academic achievement assessments indicated that the student's broad reading and math skills were generally at a kindergarten level, and he had difficulty with a drawing task (id. at pp. 1-2). The evaluators reported that despite the "positive influence" of the letter board on the student's vocabulary and communication skills, that "did not translate into other areas" of the cognitive assessment or academic achievement testing, rather, the "huge discrepancy between [the student's] motor functioning and his speech and language skills severely impacted his overall performance" (id.).

A neuropsychologist and a clinical psychologist conducted a psychoeducational evaluation of the student over three dates in June and July 2018 (Parent Ex. B at pp. 1, 7). According to the report, "the current evaluation reflect[ed] [the student's] ability to participate in formal evaluation with R[PM] facilitation" (id. at pp. 1-2). Among other assessments, administration of receptive

[22] As noted above, the IHO erred by refusing to consider the documentary evidence proffered by the parents in this case.

and expressive vocabulary tests to the student yielded standard scores of 117 and 124, respectively, and he achieved standard scores of 93 (passage comprehension) and 76 (calculation) on these academic measures (id. at p. 8).[23] The evaluators concluded that "at this time, [the student] is only able to effectively demonstrate the extent of his knowledge through the use of a letter board and the support of a trained RPM therapist" and that "the use of a letter board, facilitated by a familiar and trained RPM therapist, is currently an essential accommodation in order for [the student] to demonstrate his knowledge, as well as to participate appropriately in any educational setting" (id. at p. 5). The evaluators recommended, among other things, that the student receive "full-time, 1:1 learning support and instruction utilizing RPM" and also "10 hours in his home setting to facilitate generalization" (id. at p. 6). This report reflects the sole recommendation for extended school day / home-based RPM services included in the hearing record (see Parent Exs. A-C; E; Dist. Exs. 1-5).

Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

Specific to the issue of generalization, the district's supervisor of speech-language pathology testified that "[g]eneralization of skills refer[ed] to the ability of students to carry over a specific skill, across multiple communicative partners and environments," which was important to their independence (Tr. pp. 53, 74). According to the speech-language supervisor, it was important that the instructional methodologies used with students had "scientific proof" to ensure that the treatments clinicians used had "a positive effect" on students' "overall communication and functioning, which would lead to generalization of skills and independence" (Tr. pp. 64-65). The speech-language supervisor testified that she had never considered the RPM an effective instructional modality, in part because her "goal as a speech provider was always to select the appropriate child respectful method of communication that would be generalized and promote the student's independence" (Tr. pp. 65-66). She stated that research existed and had been published that the RPM methodology was "not a recommended method to be used [] that would lead students to independence and generalization of skills" (Tr. pp. 74, 82; see Dist. Exs. 3-4).

According to the IEP, the May 2019 CSE considered whether or not the student would benefit from "SETSS at home" but determined that the school day program with the addition of the RPM methodology represented the student's LRE and the addition of home services were "deemed too restrictive" (Parent Ex. A at p. 27). There is some merit to the parents' argument

[23] Additionally, on a measure of nonverbal intelligence the student performed at the 3rd percentile (Parent Ex. B at p. 3). A measure of the student's adaptive functioning completed by the student's mother yielded an overall score in the low range (id. at p. 4).

about the CSE's rationale in that, in citing LRE principals, the CSE focused on the environment in which the services would be delivered without first explaining the CSE's position as to whether or not the student needed supplemental instruction or support outside of the school day in order to make progress in the classroom. Had the CSE determined that the student needed extended school day services but had LRE concerns, it would have been required to recommend the services in a less restrictive environment (i.e., in a school environment instead of in the student's home). However, the IEP also reflects the CSE's position that, before extending the student's programming beyond the school day and into home-based services, the March 2019 IEP program and services, including the addition of the RPM methodology and "the change in the assistive technology," should be implemented and "given time to work" (Parent Ex. A at p. 27). The district school psychologist testified that "at-homes services in addition to all of the other services he gets in the classroom and his related services is probably unnecessary and too much" (Tr. p. 283). She testified that, given the recommendation for use of the RPM methodology in all instructional periods, she did not feel the student "would require ten hours a week at home" (Tr. pp. 283-84). She explained her understanding that the student had been receiving RPM services at home "because he wasn't getting them in school," such that, when the CSE added RPM as a methodology to be used for "six hours a day" during the school day, the home services were no longer necessary (Tr. pp. 284-85; see Tr. pp. 220-21).

Therefore, because the one recommendation in the hearing record for the student to receive the extended day services of home-based RPM instruction was for purpose of generalizing the student's skills into the home setting and given that the March 2019 IEP was designed with additional supports and methodologies to address the student's needs during the school day, the absence of additional services extending into the student's home environment on the March 2019 IEP did not result in a denial of a FAPE (see Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day]; M.L., 2014 WL 1301957, at *11 [finding no denial of FAPE based on the CSE's failure to recommend a home-based program, noting evidence that the student would make progress without the home services, "even if not at the same rate"]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 360 [S.D.N.Y. 2010] [noting that, while some skills areas may be difficult to address in school, "such limitations are not sufficient to demonstrate that the IEP is calculated to yield regression rather than progress"]). While I understand the parents desire to see additional improvements in student's experiences in the home, the district was not required to provide "every special service necessary to maximize the student's potential" (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 756 [2d Cir. 2018], cert. denied sub nom., 139 S. Ct. 322 [2018]).

C. Implementation

As noted above, on appeal, in addition to raising the purported lack of present levels of performance and annual goals in science and social student as an IEP claim, the parents also pursue their allegation that the methodology mandated on the March 2019 IEP was not being implemented (Req. for Rev. ¶ 3). The March 2019 IEP had an implementation date of April 18, 2019 (Parent

Ex. A at pp. 1, 19-20). Given the July 6, 2019 date of the parents' due process complaint notice (see Dist. Ex. 5 at p. 1), the parents' allegations relating implementation are deemed to apply only from April 18, 2019 through the end of the 2018-19 school year.[24] The claim as stated is somewhat peculiar in that the parents are explicitly faulting the district for not implementing the same IEP that they challenged in the due process complaint notice as inappropriate. However, it is clear enough that the parents did not support a decrease in the RPM instruction for the student at any point in time and, in any event, the district was responsible to implement the RPM services pursuant to the unappealed October 2018 IHO decision.

The IDEA requires that, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243, 1251 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

In this case, the October 2018 IHO decision required RPM in all instructional periods in school and the March 2019 IEP provided that the student was to receive instruction in math, ELA, sciences, and social studies using the RPM methodology (Parent Ex. A at p. 19; SRO Ex. I). The parents implementation allegation, as stated in the due process complaint notice, was based on speculation in that the parents pointed to the text of the March 2019 IEP—i.e., the lack of specific academic achievement information and annual goals that were related to social studies and science—to question the degree that the district was implementing RPM instruction thereafter (see Dist. Ex. 5 at pp. 4-5). However, for the reasons set forth above, the IEP was not required to

[24] The March 2019 IEP recommended that the student receive 12-month services (Parent Ex. A at pp. 20-21). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). As of the date of the due process complaint notice on July 6, 2019, even if the parents allegations were based on anything more than speculation, any failure on the district's part to implement the methodology on the IEP for the first four days of the 2019-20 school would not amount to more than a de minimis failure. Moreover, beyond the date of the due process complaint notice, the parents claims, evaluated prospectively, were not based on more than "mere speculation" that the district would not adequately adhere to the IEP despite its ability to do so (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]).

include detail in the present levels of performance and annual goals with respect to each class or subject area. As such, the a mere omission of a particular annual goal in the March IEP—a point that the parents challenge as deficient in the design of the IEP—is just conjecture that the student might not have been receiving instruction using the RPM in science and social studies classes.

Instead, the available evidence from the student's special education teacher for the 2018-19 school year who testified at the impartial hearing and described that he received training from the student's private RPM therapist and "use[d] the letter board" with the student (Tr. pp. 153, 162-64, 167, 196-98; see Tr. p. 146). Given the parents' broad and speculative allegations, I find the special education teacher's testimony sufficient to show that the district was implementing the RPM methodology for the remainder of the 2018-19 school year.[25]

VII. Conclusion

Having identified the student's placement under pendency and determined that the evidence in the hearing record supports the final outcome reached by the IHO on the merits that the district offered the student a FAPE for the 2019-20 school year notwithstanding his erroneous refusal to consider relevant evidence from the parent, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated May 24, 2020, is modified by reversing that portion which denied the parents' request for a determination regarding the student's stay-put placement during the pendency of these proceedings; and

IT IS FURTHER ORDERED that the student's stay-put placement for the pendency of this proceeding consists of the program and services set forth in the December 2018 IEP as well as the use of the RPM methodology in core instructional classes as required in the prior unappealed October 2018 IHO decision on a going-forward basis.

Dated: **Albany, New York**
August 6, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER

[25] The teacher also explained that the March 2019 IEP also allowed for the student to use his PMC and that, although the RPM was used in the classroom, the student would at times verbalize that he didn't want to use it (Tr. p. 189). Even assuming that the teacher's testimony could support a finding that there were lapses in the implementation of the student's IEP using the methodology, they would not amount to more than a de minimis failure to implement the student's IEP.